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Wellington Industries, Inc. and Local 174, International Union, United Automobile, Aerospace And Agricultural Implement Workers of America (UAW), AFL-CIO and Independent Union Local One. Case 07-CA-091271

December 13, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND JOHNSON

On March 21, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board orders that the Respondent, Wellington Industries, Inc., Belleville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to deal with John Zimmick or any other designated representative of Independent Union Local One in any part of the grievance process.

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Given the circumstances of this case, the Board finds unwarranted the judge's award of litigation expenses and attorneys' fees to the General Counsel and Independent Union Local One. Members Miscimarra and Johnson do not reach whether the Board has the authority to award such fees and expenses.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Permit John Zimmick or any other designated representative of Independent Union Local One to participate in all aspects of the grievance process.

(b) Within 14 days after service by the Region, post at its Belleville, Michigan facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. December 13, 2013

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to deal with John Zimmick or any other designated representative of Independent Union Local One in any part of the grievance process.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above, which are guaranteed them by Section 7 of the Act.

WE WILL permit John Zimmick or any other designated representative of Independent Union Local One to participate in all aspects of the grievance process.

WELLINGTON INDUSTRIES, INC.

Mary Beth Foy, Esq., for the General Counsel.

Stanley C. Moore, III, Esq. (*Plunkett Cooney*), of Bloomfield Hills, Michigan, for the Respondent.

Blair Simmons, Esq. (*International Union, UAW*), of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 13, 2013. The Charging Party, UAW Local 174, filed the charge on October 15, 2012. The General Counsel issued the complaint on December 17, 2012. This case is closely related to two prior cases decided by the Board at 357 NLRB No. 135 and 358 NLRB No. 90. Indeed, the latter decision involves the identical issue; an employer's obligation to deal with the Union's chosen representative. Both of these matters have been held in abeyance by the United States Court of Appeals for the District of Columbia in light of its decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Wellington Industries, a corporation, manufactures stampings for the auto industry at its facility in Belleville, Michigan, where it annually sells and ships goods valued in excess of \$50,000 to points outside of the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Independent Union Local One is a labor organization within the meaning of Section 2(5) of the Act. There is no dispute that UAW Local 174 is also a labor organization. Respondent merely contests the proposition that UAW Local 174 represents any of its employees.

II. ALLEGED UNFAIR LABOR PRACTICES

Independent Local Union One has represented production and maintenance employees at Respondent's Belleville, Michigan facility for over 20 years. On August 8, 2010, 38 bargaining unit members out of approximately 128 attended a meeting regarding affiliation with UAW Local 174. Those attending this meeting voted to affiliate with Local 174 by a vote of 30 to 6, with 2 abstentions. Sometime afterwards, 75 employees signed a petition calling for another vote regarding affiliation. The petition alleged that there was insufficient notice with regard to the August 8, 2010 affiliation vote. Respondent has relied on this petition in refusing to recognize the affiliation of Local One with the UAW or to meet or have any dealings with UAW personnel and, more specifically, UAW Local 174 President John Zimmick.

On September 28, 2010, Respondent filed a petition with the Board challenging the affiliation of Local Union One with UAW Local 174, Case 07-RM-001496. The Regional Director dismissed this petition administratively. He also dismissed a RD decertification petition. The Board affirmed the Regional

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Director's dismissal of the RM petition on February 11, 2011, in an unpublished order. There is no indication in this record that the Board's dismissal of the RM petition or the Regional Director's dismissal of the RD petition has been appealed.

Local Union One began negotiations for a successor collective-bargaining agreement with Respondent in May 2010. On December 2, 2010, the parties signed the agreement (GC Exh. 6), which is effective from November 14, 2010, to November 13, 2013. Shortly before the contract was agreed on, Local One proposed to have Zimmick attend bargaining sessions. On November 8, 2010, Respondent refused to attend any bargaining session at which Zimmick was present.

Wellington I, 357 NLRB No. 137

On December 9, 2011, the Board affirmed Judge Keltner Locke's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to negotiate with Local Union One if Zimmick was present at the collective-bargaining sessions, 357 NLRB No. 137. In a footnote, the Board noted that it had already reviewed the validity of the affiliation and declined to reconsider it.

Wellington II, 358 NLRB No. 90

The second complaint related to this matter alleged that Respondent violated Section 8(a)(5) and (1) by failing to provide information requested by Local Union One on July 12, 2011, and refusing to allow John Zimmick to attend a grievance hearing regarding discipline issued to unit member Shane Cook.

On June 13, 2011, Mark Roggero handed Respondent's human resources manager, Gary Sievert, a slip of paper notifying Respondent that John Zimmick wanted to attend a grievance hearing regarding disciplinary action taken against unit member Shane Cook. About a week later, Sievert informed Roggero that Respondent would not allow Zimmick to attend this hearing.

The Board held that Respondent violated Section 8(a)(5) and (1) by refusing to permit Zimmick to attend this grievance hearing. In doing so, it relied exclusively on its precedent that absent extraordinary circumstances, the Act imposes on employees, employers, and union an obligation to deal with each other's chosen representatives. It specifically eschewed reliance on its prior finding that Independent Union One was validly affiliated with UAW Local 74.

Wellington III (the instant case)

On September 19, 2012, the Union's second-shift steward, Jerry McGraw, filed a grievance on behalf on unit member Tony Williams. Respondent proposed to terminate Williams' employment due to attendance issues. On September 24, Gary Sievert, Respondent's human resources director, denied the grievance at step 2 of the contractually mandated grievance procedure *in a response to McGraw*. McGraw, on behalf of the Union, notified Sievert that it wished to proceed to step 3 of the grievance procedure. Step 3 involves a hearing before a council of three members; one chosen by the Union, one chosen by management, and a third chosen by mutual agreement between management and the Union.

McGraw solicited three people to serve on the council and gave these names to Sievert. He then contacted John Zimmick

and asked Zimmick if he could attend the council hearing. McGraw and Sievert scheduled the time and date of the council hearing for October 2, 2012, at 3:30 p.m. Neither informed the union president, Corbett Crider, of the date and time for the hearing.¹ McGraw, however, did so inform Zimmick.

Zimmick called McGraw on October 2 and told him that he would attend the council hearing and would meet McGraw in the company parking lot. Union President Crider did not find out the date and time of the council hearing until October 2, when he called John Zimmick on another matter. Crider, who works the first shift, stayed at the plant after his shift ended and went to Gary Sievert's office to advise him that Zimmick was at the plant for the hearing.

The following is Gary Sievert's account of his conversation with Crider, which I credit. Sievert told Crider that he was surprised that Zimmick was going to attend the council. Either before or after this, Crider said he was surprised as well. Crider also told Sievert that Zimmick had told Crider that Williams' case seemed to be open and shut. Crider also told Sievert that if the council upheld Sievert's decision to terminate Williams, the Union would not proceed further with the grievance.

Sievert told Crider that if Zimmick insisted on participating Respondent would cancel the council hearing. This was not the first time that Sievert had refused to allow Zimmick to participate in a step 3 proceeding. He had done so previously regarding a council hearing filed on behalf of Crider.

On October 2, the day of the Williams council hearing, Crider told Sievert that if he told Zimmick to leave Zimmick would do so. Crider and Sievert went to another building where the council hearing was to take place. There they met Zimmick, McGraw, and grievant Tony Williams. Sievert told Zimmick he was not allowed into the facility. Zimmick then left with Crider and McGraw.

McGraw returned to the hearing room. He told Sievert that Zimmick had told him to proceed with the council hearing and that the UAW would not contest the findings of the council. McGraw represented the Union at the council hearing. The council upheld Williams' termination and the Union accepted that decision without going to step 4 arbitration.

Analysis

This case is indistinguishable from the last one. Board law is crystal clear that employees, unions, and employers have the right to select whomever they choose to represent them for purposes of collective bargaining and grievance adjustment. Conversely, the other parties must deal with the other's chosen representative except in extraordinary circumstances not present in this case, *United Parcel Service*, 330 NLRB 1020 (2000). One such exception is one in which the representative has assaulted a representative of the other party previously, *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980).

It is not unusual for party in collective bargaining to be represented by a person who is not a bargaining unit member or not directly employed by the employer, see, e.g., *Pleasantview Nursing Home*, 335 NLRB 963, 967 (2001), in which the em-

¹ Crider replaced Mark Roggero as president of the Local One in December 2011.

ployer's chief negotiator in some contract negotiations was an attorney with the employer's law firm.

Respondent's defense to the complaint allegations appears to rely either on its refusal to recognize the affiliation of Local Union One with UAW Local 174, or statements made by Corbett Crider to Human Resources Director Gary Sievert on October 2, or both. Both arguments are patently frivolous. As the first argument, the Union has a right to be represented by John Zimmick regardless of whether or not Local One's affiliation with UAW Local 174 is valid, *United Parcel Service*, supra.

Respondent's reliance on Sievert's conversations with Crider is equally frivolous. Respondent does not contend that Steward Jerry McGraw was not authorized by the Union to select its representative for the Tony Williams grievance. McGraw filed the grievance and Respondent responded directly to McGraw, not Crider, in denying the grievance. Respondent dealt exclusively with McGraw in setting up the step 3 council hearing. Finally, only McGraw represented the Union at the council hearing. The fact that neither McGraw nor Zimmick notified Crider as to the time and place of the council hearing is irrelevant to this case.

It is also irrelevant that Crider told Sievert that Zimmick had indicated that the Williams grievance was open and shut and that the Union would not proceed beyond step 3. In this regard, I would note that Sievert did not tell either Crider, McGraw, or Zimmick that he would not allow Zimmick to participate in the step 3 proceeding based on what Crider has said to him. Indeed, he didn't give a reason. I find that Sievert did not rely on his conversation with Crider in refusing to allow Zimmick to attend the council meeting. Sievert also did not challenge Jerry McGraw's authority to select Zimmick to represent the Union in the step 3 proceeding.

Moreover, it is clear from Respondent's past conduct that Respondent has made a decision not to allow Zimmick to represent the Union solely on the basis of his status as president of UAW Local 174. This past conduct includes not only the prior litigated cases, but its refusal to allow Zimmick to represent the Union in Crider's step 3 grievance proceeding.

Reimbursement of Costs and Expenses

The General Counsel seeks an order requiring Respondent to reimburse the Board and Local One for all costs and expenses incurred in investigation, preparation, and conduct of this case. This is an extraordinary remedy. Awarding of such costs is inappropriate so long as the defenses raised by Respondent are "debatable" rather than "frivolous," *Kima-TV*, 324 NLRB 1148 (1997),² *Heck's Inc.*, 215 NLRB 765 (1974).

In the instant case, the award of such costs is appropriate. There are no credibility determinations adverse to Respondent in this decision. Respondent has refused to allow the Union to select John Zimmick to represent it solely on the basis of his status as President of UAW Local 174. There is no legitimate argument to be made in support of this position. Indeed, Respondent has failed to cite any such support.

² Sometimes cited as *Retlaw Broadcasting Co.*

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(5) in refusing to allow John Zimmick to assist Local One at the step 3 grievance proceeding for Anthony Williams on October 15, 2012.

2. Respondent's defenses to the complaint allegations are frivolous.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has engaged in frivolous litigation I shall order that Respondent pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this case. Such costs are to be determined at the compliance stage of these proceedings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Wellington Industries, Inc., Belleville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to permit John Zimmick or any other representative of UAW Local 174 from assisting Independent Local Union One in any part of the grievance process, if Local One has selected such person as one of its representatives.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Permit John Zimmick and any other representative of UAW Local 174 to participate in any part of the grievance process if chosen as a representative by Local One.

(b) Within 14 days after service by the Region, post at its Belleville, Michigan facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(e) Pay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this case. Such costs are to be determined at the compliance stage of these proceedings.

Dated, Washington, D.C., March 21, 2013.

APPENDIX

NOTICE TO EMPLOYEES

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to allow Independent Union Local One to obtain assistance from any representative of its choosing, including persons associated with UAW Local 174, such as John Zimmick, in any part of the grievance process, including attendance at grievance hearings and arbitrations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL permit representatives who are associated with UAW Local 174, such as John Zimmick, to assist Independent Union Local One in any part of the grievance process, including attendance at hearings and arbitrations.

WELLINGTON INDUSTRIES, INC.